In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-247

MANATEE CABLEVISION CORPORATION,
Petitioner,

vs.

FLORIDA POWER & LIGHT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Table of Authorities

CASES

CONSTITUTIONAL PROVISION AND STATUTES

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Petitioner, MANATEE CABLEVISION CORPORATION, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case. The decision below affirms and adopts a memorandum opinion of the district judge setting aside a jury's special verdict in favor of petitioner as plaintiff in a private antitrust suit and granting respondent's motion for directed verdict and for judgment in its favor.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor the memorandum opinion of the District Court for the Middle District of Florida was reported. Both are reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 26, 1978. A timely petition for rehearing was denied on May 18, 1978, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, under the evidence presented in the district court resulting in a special verdict for petitioner, the lower courts' approval of judgment for respondent deprived petitioner of its right to a jury trial guaranteed by the Seventh Amendment.
2. Whether the Court of Appeals sanctioned departure by the district court from the Fifth Circuit standard for granting a directed verdict.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Seventh Amendment to the United States Constitution providing as follows:

Amendment VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

In the district court petitioner brought an action against respondent and three other parties[1] alleging a violation of Section 1 of the Sherman Act (15 U.S.C. §1). Petitioner charged these defendants with having entered into a contract, combination or conspiracy to exclude petitioner from the community antenna television (CATV) market in the unincorporated portion of Manatee County, Florida, by granting pole attachment agreements to GTEC and withholding them from petitioner.

Ultimately, petitioner settled its claims against the GT&E companies and proceeded to trial against respondent alone.

Petitioner is a Florida corporation which engaged in the CATV business[2] in Manatee County. Respondent is a Florida corporation which generates and sells electricity in a number of areas in Florida, including Manatee County.

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1. General Telephone & Electronics Corp. ("GT&E"), a New York corporation which owns and operates telephone companies and on past occasions owned and operated CATV companies; General Telephone Company of Florida ("GTF"), a wholly owned subsidiary of GT&E and a Florida corporation owning and operating a telephone system along Florida's west coast, including Manatee County; and GT&E Communications Corp. ("GTEC"), another wholly owned subsidiary and a Delaware corporation owning and operating CATV systems in various parts of the United States, including Manatee County.

2. A CATV company uses a large antenna to receive television signals for delivery to consumers via a coaxial cable. This cable is either strung on existing utility poles, buried underground or strung on poles installed and owned by the CATV company. The quickest and least expensive method of installing a distribution system is to attach cable to existing electric or telephone utility poles. The first CATV company to construct a distribution system in an area generally secures that area against competition. Thus, a company obtaining pole attachment agreements granted by utility companies owning poles in the area can achieve a monopoly over the CATV business in that area.

The Pole Policies of FP&L

In Manatee County, respondent owned approximately 75% of the utility poles and GTF owned the remaining 25%. Pursuant to a 1961 agreement, respondent and GTF established the joint use of their respective poles for their mutual advantage within the common operating areas served by the two utilities.

Respondent had a different attitude toward CATV companies attaching to its poles than it had toward the telephone company. It did not want any CATV attachments for business reasons relating primarily to the safety of its personnel and to public reaction to cluttered poles. But in areas where there was inadequate television coverage, respondent would enter into attachment agreements with CATV companies "on a one-only and first-come basis", provided respondent reserved the right to deny attachments on any pole for any reason. Respondent recognized that giving a pole attachment agreement to one CATV company could prevent someone else from building a system in the area covered by the agreement.

Where two CATV companies were competing to establish systems in the same area, respondent had a policy of not granting pole attachment rights to either company until they had agreed to a division of the territory. The problems imposed by competing CATV companies applying for attachments in the same area led respondent in 1966 to impose a temporary freeze on any CATV attachments regardless of competition.

The Relevant Events in Chronological Sequence

In June, 1965, petitioner received an exclusive franchise for the operation of a CATV system in the unincorporated parts of Manatee County, Florida. Beginning some-

time prior to February, 1966, petitioner sought a pole attachment agreement from respondent. That request was pending during the freeze imposed by respondent on any CATV pole attachments. For whatever reason, respondent did not grant a pole attachment agreement to petitioner in 1966 or 1967.

In February, 1968, Manatee County reissued a CATV franchise to petitioner granting the exclusive right to operate a CATV system in the county until July 15, 1968, at which time the franchise became nonexclusive.

Petitioner again requested a pole attachment agreement from respondent. Such an agreement was executed by respondent but was not delivered to or picked up by petitioner. At the time the request for the agreement was made, petitioner had begun the construction of a CATV system in Manatee County by laying approximately ten miles of cable underground and by starting to install its community antenna tower.

The terms of the February, 1968, pole attachment agreement between respondent and petitioner provided that the agreement would terminate if attachments did not commence by June 15, 1968. Petitioner was suffering from financial difficulties at the time and did not make attachments under this agreement by the deadline.

As stated earlier, petitioner's CATV franchise for Manatee County became nonexclusive in July, 1968, and a second nonexclusive franchise was issued by the County to a company named Sarasota Cablevision, which also requested a pole attachment agreement from respondent for the unincorporated parts of the county. At this point, respondent advised both petitioner and Sarasota Cablevision that it would not enter into a pole agreement with either firm until they had met and mutually agreed to

the areas to be served by the firms. With one exception,[3] respondent maintained this position of not allowing either company to attach to its poles until April 29, 1969.

In January, 1969, GTEC purchased CATV systems in the cities of Bradenton and Sarasota from Sarasota Cablevision. In evaluating this purchase, GTEC analyzed the investment potential associated with expanding the system into the unincorporated portion of Manatee County. This analysis assumed that petitioner was out of business and would lose or had already lost its franchise.

On January 23, 1969, GTEC submitted a request to respondent for a pole attachment agreement covering generally that portion of Manatee County lying south of Bradenton. The request was not immediately acted upon.

On April 21, GTEC learned that another party held an option to purchase the stock of petitioner and that the deadline for the exercise of that option was April 30, 1969. Sometime shortly after April 21, GTEC learned that petitioner had been sold. This sale posed a competitive threat to GTEC in terms of loss of market potential.

On April 29, 1969, respondent reversed its policy of not dealing with either GTEC or petitioner and signed

3. The exception arose in connection with contracts obtained by Sarasota Cablevision to serve two trailer parks located in the unincorporated part of the County. The cable route to one of these trailer parks bisected a residential area in Manatee County known as Bayshore Gardens. Sarasota Cablevision started to install cable to reach these trailer parks by using the poles of GTF and by erecting its own poles to fill in the gaps created by its inability to attach to respondent's poles. The addition of these new poles, some in the front yards of the residents along the cable route, created a public furor directed not only at Sarasota Cablevision but also at respondent for being unreasonable in not allowing attachments to existing poles. Under this pressure, respondent orally agreed in late 1968 or early 1969 to allow Sarasota Cablevision to attach to some 20 or 30 poles in the trailer park run, but expressly prohibited the CATV company from attaching to poles adjacent to this trunk line so as to serve other residents in the area.

a one-page agreement with GTEC, amending an existing pole attachment agreement for the City of Bradenton to add the area in the unincorporated part of Manatee County known as Bayshore Gardens.[4]

The Bayshore Gardens area that was added by the April 29 agreement extends an average of ten blocks on either side of the 25-block length of GTEC's trunk line to the trailer park; i.e., it comprises an area of approximately 500 square blocks. Bayshore Gardens had been identified by both GTEC and petitioner as the most desirable area in Manatee County from the standpoint of CATV potential because of its high density, and as the place to start to build a system in the County.

The sale of petitioner's stock to a new owner was concluded on May 21, 1969. The next day the new owner met with respondent to request a pole attachment agreement on behalf of petitioner, but no agreement was granted.

At that time GTEC had not begun making attachments in Bayshore Gardens pursuant to the April 29 amendment to GTEC's pole attachment agreement with respondent.

Simultaneously petitioner requested a pole attachment agreement from GTF. This request was refused on July 3 on the grounds that it was the policy of GTF not to grant such agreements.

On June 3, 1969, GTEC commenced work on the first phase of construction in the Bayshore Gardens area.

4. At the time the agreement was signed, respondent had known of petitioner's moribundity for nine or more months but based its policy reversal on this circumstance. At trial petitioner urged that respondent's awareness of its moribundity would have justified a reversal many months earlier and that the real reason for respondent's abrupt change in policy was its new knowledge that petitioner was about to become a viable competitive threat to GTEC and its desire to help the General Telephone system.

On June 16, 1969, petitioner's new owner, after learning of GTEC's attachments in Bayshore Gardens, advised respondent of actions petitioner was prepared to take to halt discrimination in favor of GTEC, including action before the FCC and the possibility of a state or federal antitrust suit. The next day respondent executed the first permit for attachments by GTEC in the Bayshore Gardens area.

Petitioner then applied pressure by complaints to the Florida Public Service Commission and the FCC. During the month of July, while these complaints were being processed, GTEC continued to attach to respondent's poles in Bayshore Gardens.[5] By the end of the month GTEC had attached to 1,281 poles in the area.[6]

On July 28, 1969, respondent finally granted a pole attachment agreement to petitioner. The agreement was applicable to areas outside Bayshore Gardens and was limited to 1,281 poles, the same number of attachments made by GTEC in Bayshore Gardens under its April 29 agreement with respondent.

Armed with the foregoing catalogue of events and massive circumstantial evidence[7] supporting a Sherman Act violation, petitioner proceeded to trial on the conspiracy issues.[8] Respondent's motions for directed verdict were denied and the case was submitted to the jury on

5. During July GTEC's contractor worked 540 man-days compared to 293 man-days in June.

6. Using an average of 30-35 poles per mile, the distribution system constructed by GTEC in this area was about 40 miles long.

7. The interest of brevity precludes a more detailed statement of the operative facts and circumstances pending determination of jurisdiction.

8. The district judge bifurcated the issues and deferred trial of issues relating to injury and damages.

five special interrogatories (A1-A2), essentially focusing on why the April 29 policy reversal occurred. The jury answered all five interrogatories in favor of petitioner (A1-A2) Notwithstanding the verdict, on respondent's motion the district judge entered his memorandum order (A3) directing entry of judgment for respondent.

On appeal, the Court of Appeals adopted the district judge's opinion and affirmed the judgment in favor of respondent (A14).

REASONS FOR GRANTING THE WRIT

I. This Court Should Review a Fifth Circuit Trend Toward Displacement of the Jury As a Fact-Finding Body in Private Antitrust Suits in Which Evidence of Conspiracy Is Largely Circumstantial.

Pending this Court's determination whether it will grant the writ, petitioner is precluded by the restrictive provisions of Rule 23 from fully detailing the circumstantial evidence of conspiracy placed before the jury and the permissible inferences which might be drawn therefrom,[9] all of which was disregarded by the district judge in setting aside the jury's special verdict. These matters, of course, can be fully developed in petitioner's brief on the merits should the Court issue its writ.

Historically, this Court has granted certiorari in certain types of cases to correct erroneous rulings on particu-

9. The district judge's memorandum opinion (A3) sets forth some but not all of the circumstantial evidence relied upon by petitioner and his reasons for rejecting it. The petition for rehearing (A15) filed in the Court of Appeals discusses two deficiencies in the district judge's analysis of the evidence.

lar facts. Chief among such cases raising the issue that a trial court's action in setting aside a verdict deprived the plaintiff of the right to a jury decision have been cases arising under the Federal Employers' Liability Act[10] or the Jones Act.[11] But the Court has also reflected the same viewpoint in *Beacon Theatres* v. *Westover*, 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948, a case in which the Court granted certiorari to review an interlocutory order in a private antitrust suit permitting trial of a major issue by the court without a jury. Quoting from *Dimick* v. *Schiedt*, 293 U.S. 474, 486, 79 L.Ed. 603, 611, 55 S.Ct. 296, the Court said:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

There are compelling reasons why antitrust cases are peculiarly susceptible to jury determination. As this Court has noted in a case involving entry of a summary judgment,

> ". . . summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.[7]" (footnote omitted) *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473, 7 L.Ed. 2d 458, 464, 82 S.Ct. 486.

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10. E.g., Harris v. Pennsylvania R. Co., 361 U.S. 15, 4 L.Ed.2d 1, 80 S.Ct. 22 (see particularly appendix to opinion of Mr. Justice Douglas, concurring, containing statistical summary).

11. E.g., Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L.Ed.2d 142, 80 S.Ct. 173.

Further, the outcome in such cases frequently turns upon circumstantial evidence, requiring the fact-finding body to measure credibility and to draw inferences, either positive or negative in effect. Trial courts have long been admonished not to invade that sphere of a case, the proper delineation between the responsibilities of court and jury having long ago been made by this Court as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses . . . and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . ." *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 88 L.Ed.2d 520, 525, ... S.Ct. .....

Below, the trial jury found from the evidence that respondent knowingly participated in a conspiracy with the intent unreasonably to restrain trade by excluding petitioner from competing with another CATV company in a trade area (A2). The district judge's rejection of the special verdict which was based upon the circumstances of this case trampled upon petitioner's right to a jury decision, and the Court of Appeals compounded the error by approving the district judge's opinion.

Perhaps the most unusual aspect of the Court of Appeals' affirmance is that the same court, in another case

decided less than 30 days later involving a charge of conspiracy by another plaintiff against the same defendant, held a second time as a matter of law that a jury determination of a conspiracy issue was erroneous and should be vacated. In *Gainesville Utilities* v. *Florida Power & Light Co.*, 573 F.2d 292 (CA 5 1978), the Court of Appeals said:

> "The City of Gainesville[2] contends that by resisting an interconnection with its municipal power system Florida Power & Light (P&L) violated both Sherman Act §1 and §2. 15 U.S.C.A. §§1-2. A jury found for the defendant on special verdicts, and the District Court denied a judgment n.o.v. After an extensive review of the record, we reverse on one question only.[3] We hold that the evidence compels a finding that P&L was part of a conspiracy[4] with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida." (footnotes omitted) 573 F.2d at 293-294.

Although Florida Power & Light was the beneficiary of the first ruling and the victim under the second, the point to be made here is that the right to a jury decision in antitrust cases tried within the Fifth Circuit seems to be a vanishing phenomenon. Consequently, this Court should review the merits of the decision below as an aid to determining whether the lower courts are eroding Seventh Amendment rights in contravention of *Beacon Theatres* v. *Westover, supra.*

II. The Court of Appeals Sanctioned Departure From the Fifth Circuit Standard for Granting a Directed Verdict.

The Fifth Circuit test for grant of a directed verdict is articulated in *Boeing Co.* v. *Shipman*, 411 F.2d 365 (CA

5 1969). Paraphrased, it requires that (1) all evidence be considered in the light most favorable to the nonmovant, (2) all reasonable inferences be drawn in favor of the nonmovant, (3) the facts and inferences point so overwhelmingly in favor of the motion that reasonable men could not arrive at a contrary verdict and (4) there must be no substantial evidence opposed to the motion.

Without belaboring the point, petitioner suggests that even a cursory reading of the district judge's memorandum opinion (A3-A12) demonstrates his failure to adhere to the Fifth Circuit standard.[12] If a trial judge may re-evaluate evidence in that fashion, the pronouncements of this Court quoted under the first topic of this petition become meaningless.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

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12. ". . . a jury could equally infer. . . ." (A10); "It is questionable whether the evidence warrants any adverse inference. . . ." (A11); ". . . there is no substantial evidence of probative *facts negativing* defendant's good faith. . . ." (e.s.) (A11).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon Thomas C. MacDonald, Jr., and Robert R. Vawter, Jr., of SHACKLEFORD, FARRIOR, STALLINGS & EVANS, Post Office Box 3324, Tampa, Florida, 33601, by U. S. mail, this 11th day of August, 1978.

JULIAN CLARKSON

APPENDIX

SPECIAL INTERROGATORIES TO BE ANSWERED BY THE JURY

(Filed March 14, 1977)

(1) Has plaintiff proved by a preponderance of the evidence that at the time Florida Power & Light Company entered into the April 29, 1969 pole attachment agreement with GTEC, Florida Power & Light Company then believed that a financially responsible person had agreed to purchase Manatee Cablevision Corporation?

YES X NO .....

(2) Has plaintiff proved by a preponderance of the evidence that on or prior to April 29 or 30, 1969 there came into existence a conspiracy, the purpose of which was to unreasonably restrain trade or interstate commerce by excluding Manatee Cablevision Corporation from competing with GTEC in the unincorporated areas of Manatee County?

YES X NO .....

If your answer to special interrogatory No. 2 is NO, do not answer the remaining interrogatories.

If your answer to special interrogatory No. 2 is YES, answer interrogatory No. 3.

(3) Has plaintiff proved by a preponderance of the evidence that Florida Power & Light Company was one of the parties to such conspiracy at the time it was formed?

YES X NO .....

If your answer to special interrogatory No. 3 is NO, answer interrogatory No. 4.

(4) Has plaintiff proved by a preponderance of the evidence that Florida Power & Light Company had knowledge of the existence of such conspiracy on April 29 or 30, 1969?

YES X NO .....

If your answer to special interrogatory No. 4 is NO, do not answer interrogatory No. 5.

If your answer to special interrogatory No. 4 is YES, answer interrogatory No. 5.

(5) Has plaintiff proved by a preponderance of the evidence that with knowledge of the existence of such conspiracy, Florida Power & Light Company knowingly became a member of and participated in such conspiracy by entering into the pole attachment agreement of April 29, 1969 for the purpose and with the intent on the part of Florida Power & Light Company to aid and assist GTEC in unreasonably restraining trade and interstate commerce by excluding Manatee Cablevision Corporation from competing with GTEC in the unincorporated areas of Manatee County?

YES X NO .....

Dated this 14th day of March, 1977.

/s/ Clifford V. Cobb
Foreman

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 72-362-Civ-T-K

MANATEE CABLEVISION CORPORATION,
Plaintiff,

vs.

FLORIDA POWER & LIGHT COMPANY,
Defendant.

MEMORANDUM

(Filed March 23, 1977)

In this bifurcated trial of an alleged Section 1 Sherman Antitrust Act violation, special interrogatories were submitted to the jury on the issue of whether Florida Power & Light Company was a party to or knowingly participated in an alleged conspiracy with GTEC to exclude Manatee Cablevision Corporation from doing business in the unincorporated areas of Manatee County. Negative answers would have been dispositive of the entire case. However, the jury answered all the interrogatories in the affirmative. Theretofore, defendant had moved for a directed verdict at the close of plaintiff's case and again at the close of all the evidence on the issue of conspiracy. We reserved our ruling on these motions until after the jury's findings were returned. Defendant has now moved for judgment in accordance with its motions for directed verdict.

In the consideration of the motions for directed verdict, we do not weigh the evidence. Rather, the sole question is whether in light of the evidence as a whole, and drawing all reasonable inferences therefrom most favorable to the plaintiff there is a complete absence of probative facts to

support the jury's answers to the special interrogatories. Stated otherwise, it is only in the absence of evidence of such quality that without weighing credibility of the witnesses, reasonable and fair minded men in the exercise of impartial judgment could not arrive at a different conclusion that a motion for a directed verdict may be sustained. In this frame of reference we carefully examined all the evidence together with all reasonable inferences which could be supportive of plaintiff's claim and concluded that the evidence is not sufficient to sustain the jury's findings.

It is our purpose in this memorandum to state very briefly the reasons for our conclusion that the jury could not reasonably and without the aid of pure speculation have arrived at their answers to the special interrogatories.

The thrust of plaintiff's claim is that defendant conspired with GTEC and its "sister" company General Telephone Company, or either of them, to eliminate or exclude plaintiff as a competitor of GTEC in the community antenna television (CATV) business in the unincorporated areas of Manatee County by means of the pole attachment agreement of April 29, 1969 between GTEC and defendant.

General Telephone Company, a telephone public utility owns about 15% of the utility poles in the County. The remaining 85% are owned by defendant, an electric public utility, through a joint use agreement entered into many years before the alleged conspiracy, the telephone company was permitted to put its phone lines on defendant's poles and defendant was allowed to put electric lines on the telephone company poles.

The utility poles are important in the context of this case in that one means of delivering CATV services to customers is to attach cables to existing poles if authorized to do so by the owner of the poles. Over the long run that

method may not be as economical as placing the cables on its own poles (after setting them up), but where two CATV companies desire to operate in the same area, a company which is granted the right to use existing poles is enabled to get a competitive jump time-wise on the other company which must either bury its cables underground or set its own poles.

Neither plaintiff nor GTEC had an exclusive franchise to engage in the CATV business in the unincorporated areas of Manatee County. And because of the relationship between GTEC and General Telephone Company (both are subsidiaries of General Telephone and Electronics Corporation), GTEC had no problem with respect to obtaining the use of General Telephone Company's poles. However, neither the joint use agreement nor defendant's status as a public utility would require defendant to permit GTEC or any other CATV Company to attach its cables to defendant's poles.

Admittedly, there is no direct evidence of a conspiracy. What plaintiff argues is that there are circumstances in evidence which are compatible with the inference that on April 29 or 30, 1969, defendant knowingly and wilfully entered into the pole attachment agreement of April 29, 1969 for the purpose and with the intent of aiding GTEC and or General Telephone Company in eliminating Manatee Cablevision Company as a competitor of GTEC and therefore a submissible case of conspiracy was made. We do not agree. As we view the evidence, it is only by pure speculation and conjecture that defendant could be found to have had a conspiratorial purpose.

Initially, we fail to discern any evidence of an improper motive on the part of defendant. Unquestionably, defendant had neither a direct or an indirect interest in GTEC. And despite plaintiff's protestations to the contrary, the

mere fact that General Telephone Company, GTEC's sister company, is also a public utility is irrelevant, inasmuch as there is not even a scintilla of evidence that either the grant of the pole attachment agreement to GTEC or withholding one from plaintiff could have been to defendant's advantage in its relations with General Telephone Company.

What then, are the circumstances which plaintiff contends suffice as proof of conspiratorial conduct on the part of the defendant? By way of background, it is undisputed that for a substantial period of time prior to and on April 29 or 30, plaintiff was in a comatose state, insolvent, without customers or income, and financially unable to engage in business. A year earlier defendant had executed a pole attachment agreement with plaintiff, but that agreement had expired by its own terms by reason of the failure of plaintiff to begin construction and was voided by defendant. Subsequently, in January, 1969, GTEC (which had not theretofore operated in Manatee County) acquired Bradenton Cablevision, the then holder of the other franchise in the unincorporated areas of the County and which was operating in the City of Brandenton using defendant's poles under a pole attachment agreement. Bradenton also was permitted by defendant, pursuant to an oral agreement, to attach to defendant's poles along a direct trunk line to serve trailer parks in the Bayshore Gardens area of the county, this line being an extension of the city system. After GTEC purchased Brandenton and its franchise, it requested defendant to amend the existing pole agreement by adding a substantial portion of Manatee County. After four months of discussion and correspondence between the parties, defendant finally agreed to a limited amendment of the existing city pole attachment by the addition of an area in Bayshore Gardens which extended several blocks on either side of the

natural corridor of the trunk line in that area, this being only a small fraction of the area which GTEC had requested. It is this latter amendment, the pole attachment agreement of April 29, 1969, which plaintiff claims was granted by defendant for the purpose of excluding plaintiff from competing with GTEC in the unincorporated areas of Manatee County.

Obviously, as long as plaintiff was inactive and insolvent and for all practical purposes defunct, it could not realistically have been considered by defendant to be a prospective competitor of GTEC. Plaintiff does not contend otherwise, its position being that at the time defendant entered into the April 29, 1969 agreement, defendant either knew or believed that a financially responsible person had agreed to purchase plaintiff and make it a viable concern financially and otherwise capable of competing with GTEC. On this assumed premise, plaintiff argues that the jury could reasonably infer the necessary conspiratorial motivation on the part of defendant.

As a matter of fact, secret negotiations for the purchase of plaintiff had been in progress during April, 1969, one such possible purchaser having been GTEC itself. A Richard Leghorn, the owner of CATV systems in other states, was also secretly discussing the acquisition of plaintiff. Parenthetically, we note that changes in the ownership of plaintiff were nothing new, having occurred several times in the past. Be that as it may, the evidence favorable to plaintiff indicates that a representative of GTEC was informed on April 21, 1969 that another party was not only interested in the acquisition but was close to agreement on the terms of purchase, and was told to check back on the 28th for further developments. When he did so on April 28th, GTEC's representative was told that the company had been sold. However, the name of Leghorn was not mentioned in either conversation nor was

GTEC given specifics at any pertinent time. Plaintiff's evidence is to the effect that during the week of April 21st, Leghorn had secretly struck a "handshake" agreement to purchase plaintiff, but that the final contract was not executed until May 21st.

At most, the foregoing evidence of facts known to GTEC might have induced a belief on its part that some person of means was in the process of acquiring plaintiff with a view to removing plaintiff from its moribund status. However, anything GTEC may have believed on April 29, 1969, concerning the prospective financial viability of plaintiff is of importance only if that belief or the facts on which it was based were communicated to defendant. Prior to May 22, 1969, when Leghorn requested a pole attachment agreement on behalf of plaintiff, there had been no contact whatever between plaintiff and defendant at any time since GTEC came on the scene. Hence, in view of the complete absence of any direct evidence that defendant knew or was informed by anyone or was under the belief, before May 22, 1969, that Leghorn, or anyone else for that matter, was even considering the acquisition of plaintiff, we next consider whether there are circumstances in evidence from which the triers of the facts could reasonably conclude that defendant was aware of GTEC's belief, much less that it entertained a similar belief.

Plaintiff contends that in light of defendant's previous reluctance to be a "referee" between two competing CATV operators seeking the use of its poles, defendant should have rescinded or withdrawn from the April 29, 1969 pole attachment agreement and that its failure to do so after the May 22 meeting with Leghorn even though Leghorn did not request such rescission is a circumstance from which an inference of conspiratorial intent is permissible. It is of course, true that GTEC did not commence attaching to defendant's poles until June 4, 1969. However,

it is evident that defendant would have been subjected to the possibility of a damage action had it withheld from GTEC the right to attach to poles in the area for which it had been granted a license, simply because it was to plaintiff's advantage that defendant do so. And even if it had occurred to defendant to attempt to withdraw from its agreement with GTEC, defendant's failure to do so on or after May 22, 1969 does not negate its good faith on April 29 or 30 nor indicate that defendant then believed plaintiff was about to be revived.

Plaintiff next argues that an adverse inference may be drawn from the fact that defendant did not "immediately" offer plaintiff through Leghorn a "compensating" agreement and thereby attempt to minimize the alleged harm caused by the grant of the April 29 pole attachment agreement to GTEC. As we have noted, the April 29 pole attachment agreement was limited in scope. It did not include any part of the unincorporated areas of Manatee County other than the Bayshore Gardens area, although GTEC had sought pole attachment rights in virtually the entire county. Plaintiff's theory is that because Bayshore Gardens was more densely populated than other areas of the county and so had a greater immediate economic potential for CATV customers per cable mile, the grant of pole attachment rights therein to GTEC gave it such a substantial competitive advantage over plaintiff as to be destructive of plaintiff's ability to compete with GTEC in the entire county.

There is no evidence that defendant was aware of the alleged importance of Bayshore Gardens to plaintiff. Moreover, at this point defendant was obviously "in the middle." It is also of importance that ultimately, some two months later, under political pressure, defendant granted plaintiff's request for a pole attachment agreement

in another area of the county the effect of which was to "box in" the Bayshore Gardens area and virtually preclude expansion by GTEC.

Again, we find no basis for inferring retroactively from defendant's two months "delay" in granting plaintiff what ultimately proved to be a more profitable area of the county that its purpose in granting the GTEC pole attachment agreement of April 29 in Bayshore Gardens was to aid GTEC in destroying plaintiff's ability to compete in the unincorporated areas of the county. On plaintiff's premise, a jury could equally infer that the pole attachment agreement granted to plaintiff in July evidences a conspiracy to harm GTEC.

Other "circumstances" relied on by plaintiff are (1) that defendant "concealed" from Leghorn, or at least failed to "fully" disclose, at the May 22 meeting the full scope of the pole attachment agreement of April 29, 1969, (2) that GTEC speeded up its construction work in June, 1969, after plaintiff requested the Federal Communications Commission to accelerate consideration of plaintiff's complaint against it, and (3) that defendant allegedly failed to apprise the Florida Public Service Commission of the existence of the April 29, 1969, pole attachment agreement.

Considered either singly or in combination, none of these circumstances suffice to justify an inference of conspiracy in granting GTEC the April 29 pole attachment agreement. With respect to the information allegedly "concealed" from Leghorn on May 22, the evidence considered most favorably to plaintiff shows no more than that defendant's division manager did not expand upon his statement to Leghorn that GTEC had "some" pole rights. Leghorn made no inquiry as to the number of poles involved, and there is no evidence of any affirmative misrepresentations.

As for the "haste" of GTEC in proceeding with its construction work, not only is there no evidence that defendant was involved or that it encouraged such "haste", but in view of the FCC proceeding initiated by plaintiff, the haste was an understandable competitive reaction on the part of GTEC. It is questionable whether the evidence warrants any adverse inference from the remaining "circumstance" referred to by plaintiff, inasmuch as the Public Service Commission, through its chairman, was in fact informed of the existence of the GTEC agreement.

In our consideration of defendant's motions, we have merely touched upon the circumstances bearing upon the existence vel non of a conspiracy to which defendant was a party. And since there is no substantial evidence of probative facts negativing defendant's good faith in its dealings with GTEC and plaintiff, it follows that the requisite wrongful conspiratorial purpose and intent is absent. Having reached that conclusion, we do not decide whether there is evidence to permit a finding that the conduct complained of, if proved, tends or is reasonably calculated to prejudice the public interest which the Sherman Act is designed to protect.

In our judgment, plaintiff is simply grasping at straws after its long exhaustive search for probative facts has proved fruitless. There is an entire want of competent evidence to support plaintiff's claim. It follows that the motions for directed verdict and for judgment in accordance therewith should be sustained. The Clerk is directed to enter judgment for defendant.

Defendant has also filed an alternative motion for a new trial on the issues submitted to the jury. Inasmuch as final judgment is being entered at this time, we deem it desirable to rule, conditionally, on that motion. It does not necessarily follow from our rulings as to the sufficiency

of the evidence that the answers to the special interrogatories were against the weight of the evidence. However, we are firmly convinced in this case that the jury's answers are in fact against the overwhelming weight of the evidence, if it is found to be legally sufficient, and on that ground we conditionally sustain defendant's alternative motion for a new trial in the event our decision on the motions for directed verdict should be set aside.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 23rd day of March, 1977.

/s/ John K. Ryan
U. S. District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 72 362-Civ-T-K

MANATEE CABLEVISION CORPORATION,
Plaintiff,

vs.

FLORIDA POWER & LIGHT COMPANY,
Defendant.

JUDGMENT

(Filed March 23, 1977)

The Court having this day entered its Memorandum herein sustaining defendant's motions for directed verdict and for judgment in accordance therewith, and ordering judgment to be entered in favor of defendant.

Now, Therefore, in accordance with said order, It is Hereby Ordered and Adjudged that this action be and the same is hereby dismissed with prejudice at plaintiff's costs.

Dated this 23 day of March, 1977.

Wesley R. Thies
By /s/ Robert E. Schwebel
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1832

MANATEE CABLEVISION CORPORATION,
Plaintiff-Appellant,

v.

FLORIDA POWER & LIGHT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

(April 26, 1978)

Before BROWN, Chief Judge, AINSWORTH and VANCE, Circuit Judges.

PER CURIAM:

The District Judge properly sustained defendant's motions for directed verdict and judgment in accordance therewith. We affirm the judgment entered in favor of defendant, on the basis of the memorandum opinion of the District Judge dated March 23, 1977.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1832

MANATEE CABLEVISION CORPORATION,
Plaintiff-Appellant,

versus

FLORIDA POWER & LIGHT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

PETITION FOR REHEARING

HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, Florida 32302
Attorneys for Appellant

PETITION FOR REHEARING

Appellant petitions for rehearing of the Court's per curiam affirmance dated April 26, 1978, and submits the following statement of points and supporting argument.

I. Evidence of defendant's concealment of the existence of its pole attachment agreement with GTEC was sufficient to support an inference of conspiracy. The District Judge's announced reason for avoiding the inference is both irrational and contrary to case law.

II. The District Judge's finding that "defendant would have been subjected to the possibility of a damage action had it withheld from GTEC the right to attach to poles" is contrary to direct evidence favoring plaintiff.

ARGUMENT

Appellant presents this petition fully recognizing that to grant rehearing of a memorandum decision of affirmance would be either precedential or nearly so. Nonetheless, the petition is appropriate if not required because the Court has either approved or adopted the memorandum opinion of the District Judge, including findings and reasons which are insupportable.

The limitations imposed upon rehearing petitions by F.R.A.P. 40(b) prohibit discussion of all the deficiencies in the opinion below, nor does appellant propose to reargue the entire case. But two aspects of the District Judge's opinion, now approved by this Court, are so manifestly erroneous as to warrant further scrutiny.

I. Evidence of defendant's concealment of the existence of its pole attachment agreement with GTEC was sufficient to support an inference of conspiracy. The District Judge's announced reason for avoiding the inference is both irrational and contrary to case law.

This point should be tested by what this Court has said in an earlier case:[1]

> "The issue as to whether an act was done in good faith or in bad faith is primarily a question of fact. It involves the question of intent and may require a determination of a state of mind. Motive may be highly important. Circumstantial, as well as direct, evidence is to be considered. Inferences may, of course, be drawn by the finder of factual issues and credibility questions may be of great importance. . . . The jury is permitted, even if nothing else supports their conclusion, to make negative inferences from the testimony and attitude of defense witnesses. A jury has broad powers to draw inferences from evidence even when it is undisputed. [Citations omitted] This is the more necessary where inferences of good or bad faith must be made, which often depend so little on direct evidence and so much on inferences drawn from circumstances."

1. *Occidental Life Ins. Co. of Cal.* v. *Bob LeRoy's, Inc.*, 413 F.2d 819 (1969).

This is an anti-trust case.[2] Although the District Judge's repeated references to absence of "substantial evidence of probative facts" create the suspicion that he was searching for a "smoking pistol", appellant concedes that none was produced before the jury and none is to be found in the record brought here. What appellant insists it did produce was sufficient circumstantial evidence to warrant a jury verdict which should not have been set aside by the lower court.

The portion of the memorandum opinion below challenged by appellant's first point is quoted as follows:[3]

> "Other 'circumstances' relied on by plaintiff are . . . (3) that defendant allegedly failed to apprise the Florida Public Service Commission of the existence of the April 29, 1969, pole attachment agreement.
>
> . . .
>
> "It is questionable whether the evidence warrants any adverse inference from the remaining 'circumstance' referred to by plaintiff, inasmuch as the Public Service Commission, through its chairman, was

2. Motive is always an issue in an anti-trust case; here, defendant placed its own good faith in issue by urging its belief that plaintiff was out of business when defendant granted rights to GTEC.

3. See appendix, pp. 212-213.

in fact informed of the existence of the GTEC agreement."

The "circumstance" referred to by the District Judge was established by evidence that plaintiff's attorney wrote to the Chairman of the Florida PSC complaining of the pole attachment agreements granted to GTEC and of defendant's refusal to grant any agreements to plaintiff; that the Chairman forwarded the letter both to GTF and defendant requesting responses; and that both companies concealed the fact of the April 29 agreement between defendant and GTEC.[4]

Given these circumstances, without belaboring the point, it is completely without significance that the Chairman may have been "informed of the existence of the GTEC agreement",[5] as found by the District Judge. The obvious issue created by evidence of these circumstances was whether defendant was acting in good faith or in bad faith in concealing existence of its agreement with GTEC. *Occidental, supra,* says that a jury may draw negative inferences from the testimony and attitude of defense witnesses. Here, the jury was entitled to infer that the parallel evasive conduct of GTF and defendant was caused by the guilty knowledge they shared that the agreement was the result of a conspiracy to exclude plaintiff from the CATV market in Manatee County.

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4. See PX 24 (letter from GTF to Chairman) and PX 25 (internal memorandum passing between officials of defendant FP&L).

5. Actually, there was *no* evidence that the Chairman was informed of the *April 29* agreement between defendant and GTEC.

II. The District Judge's finding that "defendant would have been subjected to the possibility of a damage action had it withheld from GTEC the right to attach to poles" is contrary to direct evidence favoring plaintiff.

Although space limitations preclude detailed analysis of the sources of the findings and conclusions stated in the opinion below, it seems obvious that many of them either quoted or paraphrased defense theories asserted in defendant's pre-trial statement notwithstanding evidence at trial to the contrary.

Perhaps the most glaring such example is that highlighted by appellant's second point. The District Judge found and concluded:[6]

> ". . . it is evident that defendant would have been subjected to the possibility of a damage action had it withheld from GTEC the right to attach to poles in the area for which it had been granted a license."[7]

Not only is this finding or conclusion unsupported by any evidence in this case; it is directly contradicted by positive evidence to the contrary. The trial record reflects:

1. Defendant's agreement with GTEC[8] provides:

"The Licensor reserves the right to deny the licensing of any poles to the Licensee for any reason whatsoever (within the sole discretion of Licensor)."

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6. See appendix, p. 211.

7. For comparison, defendant had asserted in its pre-trial statement (Docket Entry 143, p. 18): "The agreement was proper in the first instance. Unwillingness to act dishonestly *and thus invite a suit by another* scarcely transforms an agreement into a product of conspiracy." (Emphasis added)

8. See PX 7.

2. Defendant's own witness, Hudiburg, testified:[9]

". . . We had the right in the agreement to deny an attachment for frivolous reasons, even. . . ."

How the District Judge was able to conclude in the face of this evidence that it was "evident" that defendant would have been subjected to the possibility of a damage action remains a puzzlement even today.

CONCLUSION

By approving the District Judge's opinion, this Court has adopted a conglomerate of erroneous findings and conclusions which supplanted a jury verdict fully justified by the evidence. For that reason, rehearing should be granted and is consequently requested.

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PH: (904) 224-7000

By: .....
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing has been served upon Thomas C. MacDonald, Jr., and Robert R. Vawter, Jr., of SHACKLEFORD, FARRIOR, STALLINGS & EVANS, Post Office Box 3324, Tampa, Florida 33601, by regular mail, this 5th day of May, 1978.

Julian Clarkson

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9. See appendix, p. 88.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1832

MANATEE CABLEVISION CORPORATION,
Plaintiff-Appellant,

versus

FLORIDA POWER & LIGHT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING

(Filed May 18, 1978)

Before BROWN, Chief Judge, AINSWORTH and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

ENTERED FOR THE COURT:

/s/ Robert A. Ainsworth
United States Circuit Judge